

SA Shee (Sarawak) Sdn Bhd v Sejadu Sdn Bhd**A**

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24-289 OF 1999-I

IAN CHIN J

17 FEBRUARY 2000

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Contract — *Construction of terms of contract — Final certificate issued — Contract contains clause stating that no certificate was to be conclusive evidence of design, works, material and goods — Whether final certificate was conclusive evidence as to sufficiency of work done so as to relieve contractor from liability*

The plaintiff was engaged by the defendant to do some works on a sea wall and some land reclamation. A final account and final certificate with regard to the project was issued in April 1996. The parties had some disputes but was amicably settled when the plaintiff accepted an offer of the defendant in full and final settlement of the claim of the plaintiff subject to the defendant reserving their rights to counter claim or seek recompense. In December 1997, the defendant complained and demanded rectification of cracks in certain rooms and a sea wall, and also of sink-holes on the reclaimed land. As the plaintiff disputed liability, the defendant proceeded to have the matter referred to arbitration under the contract. The plaintiff however took up this action and sought for a declaration that there was no dispute to be referred to arbitration on the ground that the plaintiff was under no liability to the defendant. The plaintiff contended that even though cl 44 of the contract provided that no certificate should be considered as conclusive evidence as to the sufficiency of any design, works, materials or goods to relieve the contractor of liability, it should be read subject to cl 43.7 which provided the final certificate and final account would become conclusive to the balance due to the parties, otherwise cl 43.7 would be repugnant. The defendant contended that cl 43.7 should be read with other related clauses of cl 43.6.5 and cl 43.10 and that the payment of the defendant was not conclusive evidence of any design, works, materials or goods in the contract.

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Held, dismissing the application with costs:

- (1) The final certificate did not resolve all the disputes between the parties but only in relation to the amount due under the certificate leaving claims relating to the designs, works, materials and goods still open. Clause 43.7 was concerned with a certificate being conclusive as to the balance due between the parties as it only dealt with the balance due and was further shown by cl 43.6.5 which spoke only of the conclusiveness of the balance due. These two provisions contrasted with cl 43.10, which dealt with payment for the interim certificate or final certificate, and not being conclusive evidence as to the 'design, works, materials or goods'. There is no conflict between cl 43.7 and cl 44 as they dealt with separate matters, that is, one with a balance and the other with designs, works, materials or goods. Therefore, there is

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A no inconsistency as to require harmonization (see pp 420G–H, A–C); *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406 distinguished.

(2) As for the so-called amicable settlement, it relates to a settlement of the dispute relating to the balance due under the certificate and does not deal with matters relating to the designs, works, materials and goods which, in any event, the defendant had reserved their right to claim. It did not address the problem of the matters which were alleged to appear after the settlement and which the defendant sought to arbitrate (see p 420F–G).

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[Bahasa Malaysia summary]

D Plaintiff telah diambil oleh defendan untuk melakukan beberapa kerja kepada tembok laut dan penebusgunaan tanah. Satu laporan muktamad dan sijil muktamad berhubung dengan projek tersebut telah dikeluarkan pada bulan April 1996. Pihak-pihak berkenaan menghadapi beberapa pertikaian tetapi telah diselesaikan secara berbaik-baik apabila plaintiff menerima satu tawaran daripada defendan di dalam tuntutan penuh dan akhir penyelesaian plaintiff tertakluk kepada defendan merizabkan hak mereka untuk membuat tuntutan balas atau memohon pampasan. Pada bulan Disember 1997, defendan mengadu dan menuntut pembaikan terhadap retakan-retakan di bilik-bilik tertentu dan tembok laut, dan juga terhadap lubang-lubang benam atas tanah yang dituntut kembali tersebut. Memandangkan plaintiff mempertikaikan tentang liabiliti, defendan seterusnya merujuk perkara tersebut kepada timbangtara di bawah kontrak tersebut. Plaintiff bagaimanapun mengambil tindakan ini dan memohon satu deklarasi bahawa tiada pertikaian yang perlu dirujuk kepada timbangtara atas alasan bahawa plaintiff tiada liabiliti kepada defendan. Plaintiff menghujahkan bahawa walaupun fasal 44 kontrak tersebut memperuntukkan bahawa tiada sijil yang sepatutnya dianggap sebagai keterangan muktamad tentang kecukupan apa-apa rekaan, kerja-kerja, bahan-bahan atau barangan untuk meringankan liabiliti kontraktor, ia seharusnya dibaca tertakluk kepada fasal 43.7 yang memperuntukkan sijil muktamad dan laporan muktamad yang akan menjadi muktamad terhadap baki yang perlu dibayar kepada pihak-pihak berkenaan, jika tidak fasal 43.7 akan menjadi bertentangan. Defendan menghujahkan bahawa fasal 43.7 hendaklah dibaca dengan fasal-fasal lain yang berkaitan dengan fasal 43.6.5 dan fasal 43.10 dan bahawa bayaran oleh defendan bukanlah keterangan muktamad tentang apa-apa rekaan, kerja-kerja, bahan-bahan atau barangan di dalam kontrak tersebut.

I **Diputuskan**, menolak permohonan tersebut dengan kos:

(1) Sijil muktamad tersebut tidak menyelesaikan semua pertikaian antara pihak-pihak berkenaan tetapi hanya berkaitan dengan jumlah yang perlu dibayar di bawah sijil tersebut dengan

membiarkan tuntutan-tuntutan berkaitan dengan rekaan, kerja-kerja, bahan-bahan dan barangan masih terbuka. Fasal 43.6.5 adalah berkenaan satu sijil yang muktamad tentang baki yang perlu dibayar antara pihak-pihak berkenaan kerana ia hanya berkaitan dengan baki yang perlu dibayar dan seterusnya dinyatakan di dalam fasal 43.6.5 yang menyebut hanya tentang kemuktamadan baki yang perlu dibayar. Kedua-dua peruntukan ini berbeza dengan fasal 43.10 yang berkaitan dengan bayaran untuk sijil interim atau sijil muktamad, dan bukan merupakan keterangan muktamad tentang 'rekaan, kerja-kerja, bahan-bahan atau barangan' tersebut. Tiada konflik antara fasal 43.7 dan fasal 44 kerana kedua-duanya berkaitan dengan perkara yang berbeza, di mana satu adalah mengenai baki dan satu lagi mengenai rekaan, kerja-kerja, bahan-bahan atau barangan tersebut. Oleh demikian, tidak wujud apa-apa yang tidak konsisten yang memerlukan pengharmonian (lihat ms 420G-H, A-C); *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406 dibeza.

- (2) Berhubung dengan penyelesaian secara terbaik-baik tersebut, ia berkaitan dengan satu penyelesaian pertikaian berhubung dengan baki yang perlu dibayar di bawah sijil tersebut dan bukan berkaitan dengan perkara-perkara berhubung dengan rekaan, kerja-kerja, bahan-bahan dan barangan tersebut yang, di dalam apa-apa keadaan, defendan telah merizabkan hak mereka terhadap tuntutan tersebut. Ia tidak mengutarakan masalah tentang perkara-perkara yang didakwa telah timbul setelah penyelesaian tersebut dan yang mana defendan telah memohon untuk ditimbangtara (lihat ms 420F-G).]

Notes

For cases on construction of terms of contract generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1883-1942.

Cases referred to

East Ham Corp v Bernard Sunley & Sons Ltd [1966] AC 406 (distsd)
James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583 (refd)

Marina Foo (Tang & Partners Advocates) and *Khoo Guan Huat (Skrine & Co)* for the plaintiff.

Christina Eng (Cf Eng Advocates) for the defendant.

Cur Adv Vult

Ian Chin J:

Introduction

The plaintiff, SA Shee (Sarawak) Sdn Bhd, took out the present action on 20 August 1999 for the purpose of preventing a certain matter from being

- A** referred to arbitration. They seek a declaration that there is no dispute and or difference to be referred to arbitration on the ground that the plaintiff is 'under no liability or further liability to the defendant'.

Facts of case

- B** The plaintiff was engaged by the defendant, Sejadu Sdn Bhd, to complete, design and construct the Damai Cove Resort Hotel under a turnkey contract for a contract sum of RM54,300,000. The contract was executed by the parties on 25 July 1992 under which the site was to be handed over by the defendant in two parts, one on the date of the execution of the contract and the other part not later than 31 December 1992. The other
- C** part was only taken over by the plaintiff on 17 March 1993 after a practical completion of the sea wall and land reclamation on the site by another company engaged by the defendant to carry them out.

- On 18 January 1995, the architect for the project certified that the project had been practically completed by the plaintiff on 28 December 1994 and stated that the defect liability will expire on 28 December 1995. This was followed by a certificate for interim payment issued on 20 January 1996 for the sum of RM3,653,027.08. A certificate dated 23 January 1996 then followed and it certified that all defects, shrinkages or other faults had been made good. On 10 April 1996 a final account and final certificate under the contract was issued for a sum of RM5,545,951.97 as the amount due to the plaintiff. By a letter dated 3 December 1996, the plaintiff informed the defendant that the final amount actually due was RM10,724,479.05 (supposedly made up of the said three sums but RM100,000 short when added up but nothing turns on this). These sums were said to be disputed by the defendant through a letter of the owner of the project dated 25 March 1996 the relevant part of which says they 'reserve all their rights to counterclaim/seek recompense' for delay, overpayment, defects, inferior quality and reimbursement of consultant fees. The letter earlier stated that though the claims of the plaintiff were being examined it should 'not be construed as wavering any of their rights in this matter'. However, this dispute appears to have been resolved when the owner on 12 June 1997 offered and the plaintiff accepted the offer of a sum of RM9,200,000 'in full and final settlement' of the claim of the plaintiff. An amicable settlement it was supposed to be but unfortunately not so because on 17 December 1997 the owner, again to be regarded as involving the defendant as well, wrote to the plaintiff to complain of and to demand rectification of the cracks in certain rooms and a sea wall. It also complained of sink-holes on the reclaimed land. The plaintiff disputed liability and, among others, maintained that these were the responsibilities of another independent contractor. The defendant and the owner then proceeded to have the matter referred to arbitration under cl 47 of the contract, hence this application to stop it.

I *Issues*

The parties are agreed that one of the issues revolve on the meaning of clauses 43.7 and 44 of the contract which are in these terms:

43.7 Subject to any deductions authorized by the conditions any balance properly stated in the final certificate in accordance with cl 43.6.4 shall as from the 30th day after the final account is agreed or by the operation of cl 43.6.5 becomes conclusive as to the balance due between the parties, be a debt payable as the case may be by the employer to the contractor or by the contractor to the employer.

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44 Effect of certificates issued

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No certificate issued under any provision of this contract shall be considered as conclusive evidence as to the sufficiency of any design, works, materials or goods to which it relates, nor shall it relieve the contractor from his liability to amend and make good all defects, shrinkages, other faults or damage as provided by this contract. In any case, no certificate shall be final and binding in any dispute between the employer and the contractor if the dispute is brought whether before an arbitrator or in the courts.

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The terms 'contractor' and 'employer' used there refer, respectively, to the plaintiff and the defendant.

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Mr Khoo Guan Huat, learned counsel for the plaintiff, argued that cl 44 should be read subject to cl 43.7 so as to harmonize the two clauses as otherwise cl 43.7 would be rendered repugnant. Learned counsel referred to *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406. In that case, a building was handed over in May 1954 and in July 1957 a final certificate for payment was issued. About two years later some of the stone panels fell off the external wall which required refixing or replacing the stone panels; the owner claimed the costs of doing it. The court there had to consider the following two clauses (at pp 411C–412B):

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Clause 24:

... (f) Upon expiration of the defects liability period or upon completion of making good defects under cl 12 of these conditions, whichever is the later, the architect shall issue a final certificate of the value of the works executed by the contractor and such final certificate, save in cases of fraud, dishonesty or fraudulent concealment relating to the works or materials or to any matter dealt with in the certificate and save as regards all defects and insufficiencies in the works of materials which a reasonable examination would not have disclosed, shall be conclusive evidence as to the sufficiency of the said works and materials. (g) Save as aforesaid no certificate of the architect shall of itself be conclusive evidence that any works or materials to which it relates are in accordance with this contract.

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Clause 27:

Provided always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith including any matter or thing left by this contract to the discretion of the architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled ... then either party shall forthwith give to the other notice in writing of such dispute or difference, and such

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- A** dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be appointed on the request of either party by the President or a Vice-President for the time being of the Royal Institute of British Architects, and the award of such arbitrator shall be final and binding on the parties. Such reference, except on art 3 or art 4 of the foregoing articles of agreement, or on the questions whether or not
- B** a certificate has been improperly withheld or is not in accordance with cl 24 of these conditions, shall not be opened until after the completion or alleged completion or abandonment of the works, unless with the written consent of the employer or the architect on his behalf and the contractor. Without prejudice to the generality of his powers the arbitrator shall have power to ... open up, review and revise any
- C** certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given.

- It is clear that while cl 24(f) provides for the final certificate to be conclusive evidence as to the sufficiency of the said works and material (save for certain circumstances which are not relevant to the present consideration) cl 27, on the other hand, made it clear that the arbitrator was free to determine any claim as if no certificate had been issued. There is thus inconsistency in the two provisions. The House of Lords there held that the specific provision as to conclusiveness of the final certificate prevails over the generality of the words in the final sentence of cl 27 as otherwise it would rob the final certificate almost entirely of its conclusive effect or render it nugatory. The House of Lords held that the final certificate could not be reopened by the arbitrator save for the exceptional circumstances mentioned in cl 24(f). The wordings of those two clauses are not the same as the two clauses of the present case. That case came as a result of the inconsistency between two clauses and resort was made to the harmonization method of construction. Therefore, it must be determined whether there is any inconsistency between cl 43.7 and cl 44 because unless there is the case of *East Ham Corp v Bernard Sunley & Sons Ltd* would have no relevance. In this regard, it is not only cl 43.7 that falls to be considered in isolation but, as rightly pointed out by Ms CJ Eng, learned counsel for the defendant, the related clauses of cl 43.6.5 and that of cl 43.10 as well, all forming part of cl 43. Clause 43.6.5 which is mentioned in cl 43.7 reads:
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- If nothing in the final account as submitted by the contractor is disputed by the employer within one month from the end of the defects liability period stated in the contract documents or from the issue of the certificate of making good defects under cl 41 or within three months of the submission of the final account to the employer by the contractor, whichever is the later, the final account so submitted shall be conclusive as to the balance due between the parties in accordance therewith.
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The other cl 43.10 reads:

- I** No payment by the employer shall of itself be conclusive evidence that any design, works, materials or goods to which it relates are in accordance with this contract.

Clause 43.7 is concerned with a certificate being conclusive as to the balance due between the parties. It deals only with the balance due and did not mention the sufficiency of the works and materials unlike cl 24 in the case of *East Ham Corp v Bernard Sunley & Sons Ltd*. That cl 43.7 deals only with the balance due is further shown by cl 43.6.5 which also speaks only of the conclusiveness of the balance due. These two provisions contrasted with cl 43.10 which deals with payment, which must necessarily be payment pursuant to either the interim certificate or final certificate, and also with it not being conclusive evidence as to the 'design, works, materials or goods'. Where, then, is the conflict between cl 43.7 making it final a balance certified by a certificate as being a debt due and cl 44 providing for such a certificate not to be final with regards to the design, works, materials or goods? They dealt with separate matters, that is one with a balance and the other with designs, works, materials or goods. Therefore, there is no inconsistency as to require harmonization.

It is trite law that the words of a document must be given its plain and ordinary meaning. It is clear to me that what the several parts of cl 43 do is to only make the certified balance conclusive. They do not state that matters relating to the designs, the works, the materials or the goods cannot be a matter of a claim. If, say for example, a building should collapse two years later due to latent defects, cl 43.10 would operate to protect the claim from being prejudiced by the payment of the balance due. It was urged that certain letters exchanged between the parties long after the execution of the contract be looked at as they, according to Ms Eng, explained the meaning of the two clauses under consideration. Such a course cannot be taken because it is not legitimate to use as an aid in the construction of a contract anything which the parties said or did after the contract was made (see *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583).

As for the so-called amicable settlement, it relates to a settlement of the dispute relating to the balance due under the certificate and does not deal with matters relating to the designs, the works, the materials and the goods which, in any event, the defendant had reserved their right to claim. It did not address the problem of the matters which are alleged to appear after the settlement and which the defendant seeks to arbitrate.

Conclusion

Therefore, the final certificate did not resolve all the disputes between the parties but only in relation to the amount due under the certificate leaving claims relating to the designs, the works, the materials and the goods still open. The plaintiff's application is accordingly dismissed with costs to the defendant.

Application dismissed with costs.

Reported by Chin En Tek